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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

ENERGY RESERVES GROUP, INC., et al.,
Petitioners,

VS.

JAMES B. EDWARDS,
SECRETARY OF ENERGY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES

AMICUS CURIAE BRIEF
OF THE STATE OF TEXAS

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THE INTEREST OF TEXAS

The State of Texas, as the foremost energy producing state in the nation,[1] is acutely interested in matters affecting the pricing structures of its energy reserves. Texas' interests are multifaceted in this regard, including its interest as royalty owner, as a taxing authority, and as conservator of natural resources.

The inclusion of injection wells in the calculation of "average daily production" would directly affect the amount of revenues generated by the State as a royalty

1. Report of the House Joint Interim Committee on a State Energy Plan, Texas House of Representatives, 66th legis. at 1.

interest owner. Texas is the royalty interest owner in 875,000 acres of land held in fee, 7,000,000 acres of mineral classified lands (retained mineral interest,) 1,000,000 acres of navigatable streams and rivers and 1,500,000 acres of submerged lands in the Gulf of Mexico for a total of 12,875,000 acres. Inclusion of injection wells in the determination of "average daily production" would qualify additional fields for the stripper well exemption and thus remove them to a higher tier pricing structure generating increased revenues to the State of Texas as royalty interest owner. The Temporary Emergency Court of Appeals' (TECA) ruling deprives Texas and her citizens of this revenue, giving them a direct financial stake in this litigation.

Further, the State of Texas as a taxing authority will be substantially affected by the outcome of this litigation. Pursuant to §81.111 of the Texas Natural Resources Code, Texas taxes each barrel of petroleum produced in the State at a rate of 3/16 of one percent. Proceeds of the tax are used for the administration of the State's oil and gas conservation laws.[2] The remainder of the tax generated revenues (a substantial portion) is deposited in the general revenue fund.[3] Thus, again it is apparent that the TECA's finding excluding injection wells in the well count would substantially reduce much needed tax revenues for not only the administration of the conservation laws, but many other general revenue projects as well.

Finally, the State of Texas is acutely interested in protecting and managing the State's resources. Texas has adopted a comprehensive set of statutes providing for the conservation of oil and gas. Prevention of waste is

2. Tex. Nat. Res. Code Ann. §81.113 (1978).

3. Tex. Nat. Res. Code Ann. §81.112 (Supp. 1982).

of primary concern.[4] The State of Texas recognizes the utility of secondary recovery in promoting maximum reservoir recovery. Accordingly, incentives are provided to further such ends.[5] Thus, the decision of the TECA frustrates the State's conservation policies by encouraging earlier shutdown due to economic inviability, thereby promoting waste of this vital natural resource.

SUMMARY OF ARGUMENT

The TECA held that prior decisions have correctly decided that Ruling 1974-29 is a reasonable interpretation of the applicable statutes and regulations. This decision is based on improperly framed issues. The TECA failed to consider whether the regulations enacted pursuant to the statutory mandate are a valid exercise of the agency's power. The district court reviewed substantial amounts of evidence on this point and concluded that the regulations are arbitrary, capricious, and a gross abuse of discretion. The TECA, in ignoring this finding, failed to consider the issues properly before the court thereby resulting in petitioners' loss of an opportunity to be heard on such a crucial issue.

In support of its argument that the agency interpretation is a proper one, the TECA speculated as to possible abuses that the inclusion of injection wells in the well count might have on industry practices. This speculation has no basis in reality. Texas, as well as other major energy producing states, has adopted a comprehensive set of regulations dealing with all phases of hydrocarbon production, including the use of injec-

4. Tex. Nat. Res. Code Ann. §§85.001 et seq. (1978)

5. The rules of the Texas Railroad Commission provide for an increased allowable for successful injection wells. Rule 48, statewide rules, Tex. R.R. Comm'n., Oil & Gas Div.

tion wells in secondary recovery. This stringent regulation combined with cost prohibitive factors makes the TECA's speculation nonsense. Further, the district court specifically found that there is no potential for abuse. The overruling of this specific finding based on unfounded speculation is improper and resulted in direct harm to petitioners.

ARGUMENT

At issue in this litigation are the regulations promulgated pursuant to a statutory mandate to exempt certain crude oil from price controls. The TECA held that the stripper well ruling excluding injection wells from determination of a property's qualification for the exemption is a reasonable interpretation of the regulations and that the stripper well regulations are neither arbitrary nor capricious.

A. THE TEMPORARY EMERGENCY COURT OF APPEALS FAILED TO CONSIDER THE PROPER ISSUE: WHETHER THE REGULATIONS PROMULGATED PURSUANT TO THE STATUTORY AUTHORITY ARE VALID.

The initial phase of this litigation considered the propriety of the procedural aspects of the rulemaking. The question as to whether the regulation from which the ruling was promulgated is valid, was specifically left unanswered by the appellate court. *Duncan v. Theis*, 613 F.2d 305 (T.E.C.A., 1979).

On remand, the district court, after a lengthy analysis, concluded that "the agency's decision to exclude injection wells from the well count for the purposes of determining average daily production was beyond the authority of the agency and was contrary to the intent of Congress." *Energy Reserves Group, Inc. v. DOE*, 520

F.Supp. 1232 (D. Kan. 1981)(*Energy Reserves Group I*). The district court specifically held that Regulation 6 C.F.R. §150.54(s), 38 Fed. Reg. 32484, and subsequent similar regulations were void and of no legal effect.

On appeal, the TECA refused to consider the validity of the regulations. Instead, it once again analyzed Ruling 1974-29. The court's misunderstanding of the issues to be decided could not be any clearer. The major portion of the court's analysis concerns a review of earlier decisions of this case. It is not surprising that the court found that the issues now before it had been previously foreclosed by earlier decisions. *Energy Reserves Group, Inc. v. DOE,* No. 10-39 (T.E.C.A., July 29, 1982). Only by a misunderstanding of the issues could the previous decisions have any application whatsoever. In its earlier opinion denying issuance of a writ of mandamus, the TECA stated:

> Whether the regulation itself was within the authority of the FEA to promulgate, despite its conceded procedural regularity, or whether it was arbitrary or capricious does not so clearly appear from a consideration of the decisions as a whole.

Duncan v. Theis, supra, at 308 (footnote omitted). Thus, it is clear that prior decisions did not address the validity of the regulations. The district court found the regulations to be beyond the authority of the agency. The TECA reversal was based on the wrong issues. Such misapplication of the previous decisions resulted in depriving petitioners' opportunity to be heard on the proper issues.

B. THE STATE OF TEXAS CAREFULLY REGULATES THE USE OF INJECTION WELLS IN SECONDARY RECOVERY.

In furtherance of its argument to support the agency action, the appellate court speculated that inclusion of injection wells in the well count could possibly lead to serious abuses of the exemption. The court envisioned unscrupulous operators drilling additional injection wells in order to qualify the field as a stripper property. It foresaw injection wells springing up all over the country. It is apparent that this rationalization on the court's behalf was a factor in the decision making process and necessarily influenced that decision. This speculation of possible abuse is not based on rational thought, is flatly incorrect, and is directly contrary to the evidence and findings of the lower court. The lower court reviewed a substantial amount of evidence on state regulatory practices in this area, the relative cost of injection wells and the sophistication involved in proper management of a secondary recovery operation. That court heid:

> Because of natural forces, a provision allowing the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells. Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse.

Energy Reserves Group I, supra, at 1264. It is error for the appellate court to override the findings of the district court unless clearly erroneous.

It is clear from the State of Texas regulatory practices that the lower court's finding is not erroneous. Texas has adopted a comprehensive set of regulations to govern the oil and gas industry. Included in these rules and regulations are provisions governing injection wells and secondary recovery. The Texas Railroad Commission (hereinafter "RRC") is empowered to regulate the oil and gas industry and has established specific rules to deal with injection wells. (Statewide rules, R.R.

Comm'n, Oil & Gas Div.) All persons engaged in fluid injection projects are required to obtain a permit from the RRC. (Rule 46(a)). An application is required. (Rule 46(b)). The rules also regulate casing (Rule 46(f)), tubing and packer (Rule 46(g)(1)), and pressure observation valves (Rule 46(g)(2)). The operator of the injection well is required to report annually to the RRC (Rule 46(i)).

Before beginning injection operations, the operator is required to meet minimum pressure tests (Rule 46(j)). Failure to comply with all of the above stringent rules subjects the operator to substantial penalties (Rule 46(l)).

It is indeed incredible that the appellate court could find a potential for abuse in light of the current state practices carefully regulating the use of injection wells. Such a finding flies in the face of reality. The lower court's finding of no potential for abuse, amply supported by evidence, should remain intact.

Further, the State of Texas has been encouraging the use of injection wells in secondary recovery so as to promote maximum hydrocarbon recovery and minimize waste. RRC rules provide for increased allowables for water flood operations. Throughout the course of this practice, Texas has yet to encounter a plethora of injection wells all over the state as envisioned by the TECA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by certified mail, return receipt requested to all interested parties on this the _____ day of November, 1982.

_____

ANDREW KEVER